

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 20, 2007

STATE OF TENNESSEE v. GINA LOLA SMITH

Direct Appeal from the Circuit Court for Montgomery County
No. 40500929 Michael R. Jones, Judge

No. M2006-02150-CCA-R9-CD - Filed April 4, 2007

The defendant, Gina Lola Smith, was indicted for one count of theft over \$500 and one count of theft over \$1000. She applied for pretrial diversion, and the State denied her request. After granting her petition for a writ of certiorari, the trial court ruled that the State abused its discretion in denying pretrial diversion. Subsequently, the trial court denied the State's motion to reconsider but granted permission to file this interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. Following our review, we reverse the trial court's ruling and remand for further proceedings consistent with this opinion.

Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Circuit Court Reversed and Remanded

ALAN E. GLENN, J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; John W. Carney, Jr., District Attorney General; and Christopher G. Clark, Assistant District Attorney General, for the appellant, State of Tennessee.

Rebecca F. Stevens, Assistant Public Defender, for the appellee, Gina Lola Smith.

OPINION

FACTS

The charges against the defendant resulted from unauthorized expenditures she made with credit cards belonging to Jasper Fisher who, apparently, was an elderly man for whom she worked as a housekeeper and caretaker. The defendant is charged in a two-count indictment, the first count alleging that in January through February 2005, she obtained money in excess of \$500 which was the property of Jasper Fisher, and the second count alleging that in March 2005, she obtained money in excess of \$1000 which, also, was the property of Mr. Fisher.

The defendant filed her application for diversion on January 13, 2006, and on February 7, 2006, a statement of the facts, which asserted that “Fisher was kind to her, and she was helpful to him, and the relationship developed beyond that of employer/employee.” As to the facts of the matter, she stated further that

[i]f the relationship had resulted as Mr. Fisher apparently hoped at one time, this case would never have happened. However, Mr. Fisher’s health deteriorated and he was placed in a nursing home, at which time his relatives became involved in the situation. It is our understanding that they view the situation differently, and that Mr. Fisher has now given his nephew power of attorney.

The State’s view of the circumstances of the offenses was set out in its letter denying pretrial diversion and differed substantially from that of the defendant:

Although [the defendant’s actions] were indicted as only two different criminal charges, these charges represent a theft spree of at least twelve different incidents. While the elderly victim, Mr. Jasper Fisher, was in the hospital, the [d]efendant removed about \$800 dollars from two different wallets belonging to Mr. Fisher. Furthermore, she had removed his credit cards from his wallets and used them without permission. On March 19, 2005, Mr. William Smathers, Power of Attorney for Mr. Fisher, told the [d]efendant not to use any of Mr. Fisher’s credit cards. Mr. Fisher told Mr. Smathers that his credit cards were in his wallet. Mr. Fisher’s wallets were found in the possession of the [d]efendant. His credit cards were not in his wallet but rather in the [d]efendant’s purse. Upon request, she returned some of Mr. Fisher’s credit cards. She did not return Mr. Fisher’s BP credit card. . . . [S]he went on a spending spree with the card. . . . In a period of six days, she spent \$1,577.47. Five of those transactions were at The Sun Solution, where she worked. . . . The [d]efendant was using Mr. Fisher’s card to get cash when she knew that she had been explicitly told not to use the card. When asked why she used the card after being told not to, she said, “I needed some things.”

The State’s letter explained how the factors which were set out in the diversion denial letter were weighed in reaching the decision that the defendant should not be placed in the diversion program. The State gave “great weight to the fact that the [d]efendant committed numerous crimes over a six-day period [and] to the fact that the [d]efendant lied about having the card in her possession and had been very explicitly told not to use the card.” The prosecutor reasoned that these factors weighed heavily against the defendant because they demonstrated that her actions were not impulsive, but rather the result of “a premeditated scheme or plan.” The prosecutor gave “great weight” as well to the fact that the defendant chose as a victim, an “elderly man with serious health problems” who “trusted the [d]efendant to help him in his time of need.” However, “[i]nstead of helping, she betrayed his trust, lied to his Power of Attorney, stole his cash and credit cards, and spent his money while he was on his deathbed, unable to prevent it.”

In addition, the State weighed the defendant's lack of candor heavily against granting diversion, stating:

The [d]efendant has made admissions to Mr. Smathers about using the card, but, when given the chance to address the situation here, she chose only to shift blame to Mr. Smathers and/or other family members.

Even after being caught "red handed," she refuses to take any blame and casts all blame on everyone else. There is absolutely no way that the [d]efendant is amenable to correction if she does not feel she needs to be corrected, if she will not accept fault.

According to the State's letter, the defendant had "provided no evidence of work history." However, the letter stated there was evidence that the defendant had worked at The Sun Solution at the time of the offenses where, according to the State, some of the transactions alleged in Count 2 of the indictment had occurred. Accordingly, the State weighed the defendant's work record heavily against her because she "used her skills of employment as well as the tools of that job to get cash from illegal transactions using Mr. Fisher's credit card." Regarding the likelihood that pretrial diversion would serve the ends of justice, the State opined that because the defendant failed to heed the warnings of Mr. Smathers regarding use of the credit card, "there is no sound evidence that she will follow the warnings of pretrial diversion." Instead, the State reasoned that if granted diversion, she would "be a repeat offender" and that this factor too weighed heavily against the defendant.

The State also concluded that pretrial diversion for the defendant was not in the best interest of the public:

With regard to the public, there is a substantial need for deterrence with regard to thefts of credit cards and credit information. We live in a highly automated society where it has become incredibly easy to steal access to a person's financial accounts. It is widely known among the legal community that identity theft is fastest [sic] growing crime in America. With rapidly evolving technology increasing the automation of accounts, this type of crime is becoming a serious, nationwide problem. This type of crime affects all of us because the cost typically falls back on credit card and banking institutions . . . [and is then] charged to consumers in the form of higher prices and costs of services.

The defendant's physical and mental conditions were assigned no weight either for or against diversion. Similarly, the State weighed her lack of criminal convictions and social history:

I have considered and given due weight to the fact that the [d]efendant has no criminal convictions. That is not to say, however, that she has no history of criminal activity. In her application for pretrial diversion, she admits that she has abused prescription pain medication. . . . The [d]efendant, through her attorney, also admits

that the drug problem has escalated to the point of necessitating rehabilitation. I note that the State has not been provided with a copy of any prescription of any kind for the [d]efendant or any proof of efforts at rehabilitation. This evidence weighs slightly against the [d]efendant's application. Balanced with the fact that she has no criminal convictions, which weighs slightly in her favor, I feel that the two factors cancel each other out of the equation.

In sum, the State concluded that there was "little weight to support the [d]efendant's amenability to correction" and that it was "in the best interest of [j]ustice that the [d]efendant be denied pretrial diversion and, instead, [be] prosecuted for the crimes that she has committed."

After granting the defendant's petition for a writ of certiorari, the trial court ruled the State abused its discretion in denying pretrial diversion. The State filed a motion to reconsider accompanied by a memorandum of law asserting that the trial court improperly "substituted its opinion for that of the prosecutor," instead of deferring "to the State's findings as required by law." The trial court denied the State's motion but granted the request to file this interlocutory appeal.

ANALYSIS

On appeal, the State again argues that the trial court improperly "failed to give proper deference to the prosecuting attorney's judgment by merely substituting the court's judgment for the prosecutor's." The defendant counters that the implications discernable from the trial court's ruling are sufficient for this court to uphold it. We will review these claims.

Our legislature has provided that the decision to grant pretrial diversion rests within the discretion of the district attorney general. See Tenn. Code Ann. § 40-15-105 (Supp. 2005); see also State v. Curry, 988 S.W.2d 153, 157 (Tenn. 1999) ("[W]hether to grant pretrial diversion to a qualified defendant who is statutorily eligible is a determination that lies in the discretion of the district attorney general."). While our legislature has defined a "qualified defendant" as one who meets the statutory requirements set out in Tennessee Code Annotated section 40-15-105(a)(1)(B)(I) (Supp. 2005),¹ the courts have provided additional guidance to prosecutors in determining which defendants, among those who pass the statutory requirements, are most suitable for pretrial diversion.

¹ According to this section, a "qualified defendant" must meet each of the following requirements:

(a) The defendant has not previously been granted pretrial diversion under the provisions of this chapter or judicial diversion under the provisions of § 40-35-313;

(b) The defendant does not have a prior misdemeanor conviction for which a sentence of confinement is served or a prior felony conviction within a five-year period after completing the sentence or probationary program for such prior conviction; and

(c) The offense for which the prosecution is being suspended is not a Class A or Class B felony or a Class C felony as defined in subsection (a), a sexual offense, driving under the influence of an intoxicant as prohibited by § 55-10-401, or vehicular assault as prohibited by § 39-13-106.

See, e.g., Curry, 988 S.W.2d at 157 (“One who is statutorily eligible is not presumptively entitled to diversion.”). The factors relevant to the prosecutor's determination focus on the defendant's “amenability to correction.” Id. (quoting State v. Pinkham, 955 S.W.2d 956, 959–60 (Tenn. 1997)).

Our supreme court stated, in State v. Bell, 69 S.W.3d 171, 177 (Tenn. 2002), that the State's responsibility, when reviewing an application for pretrial diversion, was to consider and discuss all relevant factors:

In cases where the district attorney general denies an application for pretrial diversion, the denial must be written and must discuss all of the relevant factors considered and the weight accorded to each factor. Curry, 988 S.W.2d at 157. That a defendant bears the burden of establishing suitability for diversion does not relieve the district attorney general of the obligation of examining all of the relevant factors and of setting out all of the required written findings. Id.; see also Pinkham, 955 S.W.2d at 959. In addition, the denial statement must identify factual disputes between the evidence relied upon and the application filed by the defendant. Curry, 988 S.W.2d at 157.

The function of the trial court considering a petition for writ of certiorari, also was explained in Bell as being for the court to review the evidence considered by the State and determine whether the district attorney general abused his or her discretion in denying diversion:

If an application for pretrial diversion is denied, the defendant may appeal to the trial court for a writ of certiorari. Tenn. Code Ann. § 40-15-105(b)(3) (1997 & Supp. 2001). On review, the trial court must consider only the evidence considered by the district attorney general and must determine whether the district attorney general has abused his or her discretion. See State v. Curry, 988 S.W.2d at 158 (citation omitted). *To determine whether there has been an abuse of discretion, the trial court must determine whether the district attorney general has considered all of the relevant factors and whether substantial evidence existed to support the denial of diversion.* Id.; see also State v. Hammersley, 650 S.W.2d [352, 353 (Tenn. 1983)].

Id. at 177 (footnote omitted) (emphasis added). The scope of a hearing on a petition for writ of certiorari is “only to resolve any factual disputes raised by the district attorney general or the defendant.” Id. at 177 (citing Curry, 988 S.W.2d at 158).

The court further detailed, in Bell, the limited review of the trial court in hearing a petition for certiorari in a diversion matter:

It is critical to emphasize that the discretion to grant or deny pretrial diversion rests with the district attorney general, not the trial court. The trial court, in exercising its rather limited review pursuant to a petition for a writ of certiorari, *may*

not re-weigh the evidence or substitute its view for that of the district attorney general. See, e.g., Ben H. Cantrell, Review of Administrative Decisions by Writ of Certiorari in Tennessee, 4 MEM. ST. L. REV. 19, 20 (1973). Instead, the trial court must only determine whether the district attorney general has abused his or her discretion by failing to consider and weigh all of the relevant factors or by reaching a decision that is not supported by substantial evidence. State v. Curry, 988 S.W.2d at 158; see also State v. Hammersley, 650 S.W.2d at 355.

Id. at 179 (emphasis added); see also State v. William Earl Cherry, No. M2005-02327-CCA-R9-CO, 2006 WL 2069424, at *6–7 (Tenn. Crim. App. July 26, 2006).

In the present case, the trial court concluded that the State abused its discretion in denying pretrial diversion, entering the following order:

This cause was heard . . . upon the Petition for Writ of Certiorari filed by the defendant, the State’s written response to the defendant’s Application for Pretrial Diversion, the testimony of one witness and the [a]rguments of counsel. After hearing the testimony of the defendant’s sister, the court found that there was no conflict in the facts between the application for pretrial diversion and the response. The only matter for the court to consider is whether or not the [S]tate abused its discretion in denying pretrial diversion.

The State [in the second paragraph of its response] acknowledged that it gave “great weight to the fact that the Defendant committed numerous crimes over a six day period.” The court has read State v. Curry, 988 S.W.2d 153 (Tenn. 1999) to determine whether or not the State abused its discretion. In Curry, the State’s denial of pretrial diversion included the following:

During a period of approximately two years, from July 1, 1993, through July 11, 1995, approximately \$27,368.73 in city funds were embezzled by her. This was [] not a one time embezzlement or theft but a complicated well-thought out criminal scheme to take money from the city of McKenzie.

[Curry, 988 S.W.2d at 156.] Further from Curry, “the prosecutor’s primary consideration in the written denial of diversion was the circumstances of the offense, specifically the amount of money taken and the duration of the criminal activity.” [Id. at 158]

The State also relied upon the fact that the defendant did not admit to the crime. The defendant is not required to admit to the crime.

The court has carefully considered this case. The court believes that the circumstances of the offense should not have been given overwhelming significance. The defendant's social history, work record, physical condition and mental condition are all favorable. The court believes and finds that the [S]tate did abuse its discretion in denying this defendant pretrial diversion.

In the April 11, 2006, letter of the district attorney general denying diversion, the State considered, as set out in separate categories in the letter, whether the defendant was qualified for diversion; the circumstances of the offenses; factual discrepancies between the State's understanding of the facts and those of the defendant; the defendant's criminal and social history; the defendant's work record; the defendant's physical and mental condition; the likelihood that placing the defendant in the pretrial diversion program would serve the ends of justice; and whether granting pretrial diversion was in the best interest of both the public and the defendant.

The defendant argues that the trial court, "*while not precisely saying so, . . .* determined that the district attorney general abused his discretion because he had not shown substantial evidence that the circumstances of the offense had such overwhelming significance as to outweigh all other factors."

In its order concluding that the defendant should be granted pretrial diversion, the trial court stated that "[a]fter hearing the testimony of the defendant's sister, the court found that there was no conflict in the facts between the application for pretrial diversion and the response." The record on appeal contains no evidence that an evidentiary hearing was held in this matter to resolve factual conflicts. Therefore, it is unclear at what point the defendant's sister testified or what she said. We note, however, that the defendant's view of the facts, which she signed and her attorney supplied to the district attorney general, appears to deny criminal intent and characterize the matter as a misunderstanding which she had with the victim's relatives. By contrast, the State's version of the facts, as set out in the letter denying diversion, details very specific claims of multiple criminal acts by the defendant, notably, that while the victim was in the hospital, she took his two wallets, removed from them \$800 and his credit cards, which she then used without his permission. These allegations would appear to be those set out in Count 1 of the indictment. According to the State's letter, the defendant was told on March 19, 2005, by Mr. Smathers, who had the victim's power of attorney, that she should not use the defendant's credit cards, which were found in the defendant's purse, and she had his wallets as well. Although she returned some of the credit cards, according to the State, she kept the defendant's BP card and, in a period of six days, charged six transactions to it in the sum of \$1,577.47, with five of the transactions being at a business called "The Sun Solution" where she worked.

We disagree with the trial court's reliance on Curry in its order. In that case, our supreme court concluded that the prosecutor committed an abuse of discretion for failing to consider and weigh all relevant factors regarding whether to grant pretrial diversion:

In this case, the prosecutor's denial letter concentrated solely upon the circumstances of the offense and, arguably, a veiled consideration of deterrence. There was no apparent consideration given to the defendant's lack of a criminal record, favorable social history, and obvious amenability to correction. Moreover, the prosecutor did not articulate or state why those factors that were considered, i.e., seriousness of the offense and deterrence, necessarily outweighed the other relevant factors. The evidence presented a close case on the diversion question; however, the failure by the prosecutor to consider and articulate all of the relevant factors constitutes an abuse of discretion.

Curry, 988 S.W.2d at 159. By contrast in this case, as set out above, the prosecutor fully articulated and weighed each relevant factor in its letter denying pretrial diversion. The trial court did not conclude that the State had failed to consider any relevant evidence but, rather, that “overwhelming significance” had been given to the circumstances of the offenses.

Thus, the situation presented on appeal is, in the letter denying diversion, the State made detailed and very specific claims against the defendant. At some point, her sister testified, although we do not know when this occurred or the substance of this testimony. However, after hearing the sister’s testimony, the trial court concluded that there was “no conflict in the facts between the application for pretrial diversion and the response.” The initial version of facts presented by the defendant appears to be irreconcilable with the detailed statement of facts filed by the State, and there is no proof that the State altered its position. Thus, since the trial court determined, after hearing testimony of the defendant’s sister, that there was no conflict in each side’s version of the fact, we must assume that the defendant’s sister agreed with the State’s version. That being the case, we disagree with the trial court’s determination “that the circumstances of the offense should not have been given overwhelming significance.” In fact, the State’s version of the facts showed multiple criminal acts committed by the defendant over a period of about three months, as well as her filing a deceptive version of the facts with her request for diversion. As such, we conclude that the trial court substituted its judgment for that of the State.

CONCLUSION

Based on the foregoing authorities and reasoning, we reverse the order of the trial court and remand for further proceedings consistent with this opinion.

ALAN E. GLENN, JUDGE